United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1260

To be argued by
STANLEY A. TEITLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1260

B P/S

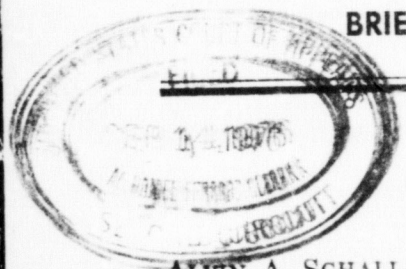
UNITED STATES OF AMERICA,
Appellee,

—against—

SEYMOUR ROSENWASSER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



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Preliminary Statement

Seymour Rosenwasser appeals from a judgment of conviction entered May 21, 1976, following a five day jury trial, in the United States District Court for the Eastern District of New York (Platt, *J.*). Rosenwasser was tried with Gerald Allicino and was convicted of having possessed a quantity of women's garments which had been stolen from an interstate shipment of freight in violation of 18 U.S.C. § 659. On May 21, 1976, appellant was sentenced to a two year term of imprisonment and a $5,000 fine. Execution of Rosenwasser's sentence has been stayed pending this appeal.[1]

[1] Rosenwasser and Allicino were tried on a two count indictment which charged them with unlawful possession of goods stolen from an interstate shipment and related conspiracy. Rosen-

[Footnote continued on following page]

On appeal, appellant Rosenwasser claims that (i) reversible error was committed when evidence of Allicino's subsequent criminal conduct was received even though the Court instructed the jury that the evidence was only to be used in determining Allicino's knowledge and intent; (ii) he was denied his right to confrontation when he himself chose not to cross-examine a witness whose testimony related exclusively to Allicino's subsequent criminal conduct; (iii) the District Court abused its discretion by precluding him from eliciting self-serving hearsay testimony from a Government witness; (iv) the Court erred by allowing the Government to improperly cross-examine him; and (v) his sentence should be overturned because the basis for its imposition was allegedly unfair.

Statement of Facts

1. The Government's Case

Paul Fleischer, an admitted hijacker and convicted felon (35-49; 129-154; 158-159),[2] was the Government's main witness. According to Fleischer, in late 1971 he met Charles Peters who at that time propositioned him to join a hijacking crew which Peters was in the process of organizing (49-50). Fleischer agreed and communicated to Peters his knowledge of an appropriate New

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wasser was acquitted on the conspiracy count. Allicino was found guilty of both the possession and the conspiracy charges. He was sentenced on the former to six months incarceration, a three year term of probation and a $2,500 fine; and, on the latter, to a six month term of confinement, a three year term of probation (both concurrent with the incarceration and probation imposed on the possession charge) and an additional $2,500 fine. Allicino's appeal was voluntarily withdrawn on June 11, 1976.

[2] All references are to the trial transcript.

Jersey "drop" for the soon to be created gang (50-51).[3] Peters was then escorted by Fleischer to inspect the scene of the drop which was located approximately five minutes from the Lincoln Tunnel (51).

Following this viewing, Peters introduced Fleischer to the other potential members of the crew at a meeting held at Paul Flammia's house in Queens, New York. There, Fleischer met Joseph Addoloria, Paul Flammia, Gerard Collins, Rocco Mastrangelo and, of course, Peters (51-53). Thereafter, in early 1972 the group met almost on a daily basis at Flammia's home, the meetings usually lasting from early morning through the afternoon (54).

In mid-February 1972 the ring's attention was directed to a truck owned by Arlene Knitwear Company ("Arlene"). Fleischer had observed cartons of women's garments being loaded each day on the truck and, his interest having been aroused, he reported the potential prize to his colleagues (56-58).

On March 2, 1972, the gang again met at Flammia's home to discuss the mode of the theft of the truck. Concensus was reached that Friday, March 3 would be an appropriate date for the hijacking and each member was given a specific assignment so as to successfully insure the expected theft of the Arlene truck.

In accordance with their scheme, the hijackers met in the heavy rain the following morning, March 3 (60). Peters, Fleischer, Collins and Addoloria converged on Troutman Street in Brooklyn where the truck had been loaded every day. Mastrangelo and Flammia arrived at the drop to await the arrival of the hijacked clothing

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[3] Fleischer translated "drop" to mean a place where hijacked trucks are brought for unloading (50-51).

(62). As the truck pulled away from its loading bay at the Arlene factory, Peters blocked the way with his vehicle. Collins, sporting a gun, ambled to the truck's passenger side and Fleischer positioned himself at the driver's side (65).[4] The Arlene driver, forced at gunpoint to leave the truck, was escorted into the stationwagon driven by Peters. Fleischer swiftly climbed behind the wheel of the stolen truck and, with Addoloria in his auto driving closely behind, started his trip for the rendezvous with Mastrangelo and Flammia (66).

Traffic was at a peak as a result of the inclement weather. Having crossed the Williamsburg Bridge from Brooklyn into Manhattan and realizing the difficulty created by the traffic jam, Fleischer and Addoloria decided to alter the original plan and transport the stolen load to the Airfreight Haulage ("Airfreight") depot on West 19th Street in Manhattan (67-68).[5] Addoloria telephoned Mastrangelo from a diner on 18th Street and informed him of the change in plans. Addoloria subsequently met with Fleischer at Airfreight (68).

When Fleischer arrived at the new drop with the stolen truck, he was greeted by a warehouseman at the depot, known to Fleischer through Fleischer's prior employment as a driver for Airfreight (41-43). Together, with the assistance of Addoloria, Fleischer and the ware-

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[4] Although the original plan called for Collins and Fleischer to be armed, Fleischer failed to carry a gun that morning since he left it in Addoloria's car. (63).

[5] The Court previously had taken judicial notice of a certified report of the U.S. Department of Commerce reflecting the weather conditions for the week of February 27 through March 4, 1972. The report showed that on March 3 nine inches of rain fell in the New York City Metropolitan area. (61-62).

houseman hurriedly broke open the truck, triggered the alarm (69 70), and, to undo what they have done, ripped every electrical wire from the alarm's connection in order to silence it (69-70). The truck was then unloaded, but to the hijackers' dismay, the wire disconnections not only silenced the alarm but also disabled the truck (71, 73). When Peters, Collins, Mastrangelo and Flammia arrived, the truck's engine failed to start. Mastrangelo telephoned Charles Forbes, the owner of the New Jersey drop who was also semi-expert in the truck repair business. Forbes had easy access to tow vehicles capable of moving the stolen truck (73, 77).[6] Mastrangelo requested Forbes to send him a "big" tow truck and approximately one hour later "Jerry" Barry, Forbes' relative, arrived with Forbes' tow truck. The stolen truck was thereafter towed to the vicinity of the then existent Manhattan Federal Detention Headquarters and was abandoned (78-79). The group, as a token of its appreciation, donated to Barry a radio stolen from the truck's dashboard and he thereafter departed (79-80); the others returned to Flammia's home where discussion commenced regarding the prospects of securing a buyer for the stolen merchandise (80-82).[7]

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[6] Government Exhibits 3 and 4 in evidence, a business record of the New York Telephone Company and a telephone bill in the name "C.H. Forbes", proved that at 11:26 A.M. on March 3, 1972, a telephone call was placed to Forbes in New Jersey from Airfreight. At 11:55 A.M. the call was apparently returned (76-77).

[7] Charles Peters, Gerard Collins, Paul Flammia, Rocco Mastrangelo, Joseph Addoloria, Charles Forbes and Gerald Barry were all named in Indictment 75 CR 275 in the Eastern District of New York in connection with the Arlene Knitwear hijacking. The first five were charged with, among other things, theft of goods in violation of 18 U.S.C. § 659 and with unlawful possession and use of a firearm during the commission of a federal felony in violation of 18 U.S.C. § 924(a) (1). All seven were charged with conspiracy to commit a theft of interstate goods in violation of 18 U.S.C. § 371.

[Footnote continued on following page]

Such a buyer was soon found. Fleischer and his crew later that day met with Allicino and showed him samples of the stolen sweaters and the shipping documents (83). Although informed that it was stolen, Allicino agreed to purchase the entire load (84-87). Arrangements were made for the contraband to be delivered to him the following Monday morning, March 6, to a factory on Brooklyn's Pacific Street (87, 88).

On the appointed day, Monday, Fleischer met with Peters, Addoloria, Mastrangelo and Flammia at the latter's home. Collins had driven to pick up the stolen goods at Airfreight in a truck rented from the Ryder Truck Rental Company (90).[8] When Collins returned, all six went to a large garment factory on Pacific Street where they met with Allicino (93). Allicino helped

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Peters, Collins and Flammia were severed from the case and all entered pleas of guilty to the firearm charges. Peters and Collins received eight year prison terms and Flammia six years. Their sentences were to run consecutively with New York State prison sentences which they were serving.

Mastrangelo and Addoloria were jointly tried and convicted. They are now serving prison terms of seven and nine years respectively (See *United States* v. *Mastrangelo* and *Addoloria*, Docket No. 75-1411; affirmed without opinion on February 25, 1976).

The cases against Forbes and Barry were severed for medical reasons. Barry ultimately entered a plea of guilty to having been an accessory after the fact to the crime of theft of goods traveling as part of an interstate shipment (18 U.S.C. § 3). He was sentenced to two years probation. Forbes stood trial alone and was convicted of the conspiracy charge. He was sentenced to a three year term of imprisonment, the execution of which was suspended, and placed on two years probation with a fine of $2,500. Forbes' conviction was affirmed by this Court without opinion on September 2, 1976. (See *United States* v. *Forbes*, Docket No. 76-1146).

[8] Government Exhibit 5, a Ryder-Rent-A-Truck contract, showed that on March 6, 1972, a truck was rented in the name of "Harold Marder". The parties stipulated that if called as a witness Mr. Marder would have testified that he never rented this truck, nor did he authorize anyone to use his name (91-92).

unload the stolen goods from the truck and bring them to appellant Rosenwasser's first floor factory by use of the freight elevator (95-98).[9] When they reached appellant's floor, Allicino introduced Rosenwasser to the group as his "partner" (99). Rosenwasser immediately proclaimed that he did not want the load. An argument ensued between Peters and Rosenwasser at the conclusion of which Rosenwasser finally agreed to buy one-third of the stolen goods (101); the remaining portion of the shipment was to be left at Rosenwasser's until the hijackers found a second buyer (102). The entire group, including Rosenwasser, concurred that the thieves ought to be paid $2,300 by appellant and his associate for the goods (104-105) and that Allicino would deliver the money to Flammia's house that night (105-106). Allicino fulfilled his obligation by delivering the payoff later that night to the hijackers and the money was thereafter divided by the group's participants (109-111).

After the hijackers left appellant's garment locale on March 6 they returned to Flammia's home where they encountered Eugene Santore and Lawrence Cesare (107). Santore was given a sample of the stolen property and sent to find a buyer for the residue (108).

The next morning, March 7, the entire group, now including Santore and Cesare, picked up the remainder of the load at Rosenwasser's and subsequently followed Santore to a two-family residence on Barbey Street in Brooklyn (108-122). There they were introduced by Santore to Wallace Cascio and Solomon Broverman,[10] resi-

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[9] Rosenwasser's testimony revealed that his business, Trekon Sportswear, Inc., was located at 2395 Pacific Street, the same building described by Fleischer (404-407).

[10] Solomon Broverman, Wallace Cascio, Eugene Santore and Lawrence Cesare were named in related Eastern District of New York indictment 75 CR 280 in which they were charged with

[Footnote continued on following page]

dents of the house (122-123). The contraband was transported into the garage and basement and arrangements were made for payment (124). Later that afternoon Fleischer and the others returned to Broverman's house, met with him and Cascio, and were paid $7,700 in cash (124-125).[11]

Much of the above testimony was corroborated. Larry Stein, president of Arlene, identified seven boxes of his firm's sweaters as being part of the March 3 hijacked interstate shipment (261, 265-276, 269-277). Thereafter, F.B.I. Agent Richard K. Redman testified that he had seized the seven boxes of sweaters from Broverman's basement after being led there by Fleischer (295-296). He also described the torn out wires of the stolen truck which he recovered across the street from the Federal Detention Headquarters on March 7 and noted that something had been removed from the dashboard (237-290, 290-295).

Pursuant to stipulation, F.B.I. interviews with Luther Washington, the hijacked truck driver, were admitted

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unlawful possession of these goods in violation of 18 U.S.C. § 659 and conspiracy in violation of 18 U.S.C. § 371. Santore and Broverman were convicted after a jury trial, Cascio was acquitted Cesare entered a plea of guilty to the unlawful possession charge. Broverman is now serving a prison term of two years (See *United States* v. *Broverman*, Docket No. 76-1037; affirmed without opinion June 7, 1976). Santore was sentenced to five years probation and Cesare was sentenced to a prison term of two and one-half years, consecutive to a federal sentence he is currently serving on an unrelated narcotics conviction.

[11] Government's Exhibits 6 and 7 in evidence, business records of the Prudential Savings Bank, proved that on March 7, 1972, Solomon Roverman of 152 Barbey Street, Brooklyn, New York, made two withdrawals totaling $7,700 from his savings accounts. The records also reflected that Broverman insisted that the money be given to him in twenty dollar bills (128-129).

into evidence and read to the jury. They corroborated Fleischer's description of the theft and kidnapping in every material respect (332-337).

The Government's concluding witness was F.B.I. Agent Ernest A. Haridopolos who explained to the jury that on March 28, 1972, he arrested Allicino for having committed a similar act and charged him with possession of an interstate shipment of hijacked liquor. He told the jury that the arrest followed a surveillance of Allicino as he unloaded the stolen goods at 2395 Pacific Street, Brooklyn, New York (307-318). At no point in his testimony, however, did Agent Haridopolos mention appellant Rosenwasser.

2. The Defense Case

Rosenwasser commenced his case by placing his reputation as to character in issue. Four witnesses testified that they were employed by Rosenwasser and had been so employed in March 1972. All testified as to his good character and stated that they had no independent recollection of March 6 or March 7, 1972 (348-387). It was settled by stipulation that if approximately fifteen to twenty additional employees were called by the defense their testimony would have been substantially the same as the four previous witnesses (389-390). After an additional character witness was called by the defense (390-400), Seymour Rosenwasser himself took the witness stand.

Rosenwasser denied any involvement in the crimes charged (401-404). He testified that for many years he had been the owner of Trekon Sportswear, located a 2395 Pacific Street in Brooklyn. He admitted knowing Allicino and his family for twenty-five years and that on March 6, 1972, the date of the crime, both he and Allicino were friends (404). In addition, Rosenwasser explicitly denied knowledge of any stolen liquor that was

stored or seized on the ground floor of his building during March 1972 (416-419).

On cross-examination, Rosenwasser acknowledged that his factory was located in the first floor loft at 2395 Pacific Street (421-422) and agreed that Allicino was once employed by him as a presser (432). When asked the time and duration of Allicino's employment, Rosenwasser contended that it was "about twenty some odd years ago, maybe for a year or two" (432) and that he had no doubt about his recollection (433). He specifically denied that Allicino had ever worked for him on other occasions (434). Moreover, he continued, when Allicino did work for him (apparently twenty years before) no payroll records were then maintained for him and, consequently, he had no memory of what he paid Allicino (434-439).

When specifically queried as to whether he had ever told anyone anything different or inconsistent with his testimony in this regard, excluding counsel, Rosenwasser unprotestingly urged that he could not recall and again gratuitously offered further testimony that Allicino never worked for him at any other time (439-441).

Appellant was then asked:

> "Mr. Rosenwasser, isn't it a fact, sir, that on January 31 of 1972 you told somebody that Mr. Allicino had worked for you from 1957 right up through and including January 31, 1972; isn't that a fact, sir?" (446-447).

Rosenwasser claimed that he did not remember (447). Upon further inquiry, Rosenwasser was then asked if he told anyone that he had been paying Allicino $250 a week during the period of his employment (447). Appellant's

memory again failed him on this score as well (448). The Government, for the purpose of refreshing his recollection, handed him a document. Rosenwasser admitted signing the document but denied that he wrote the text (448-450). The document, received in evidence solely against Rosenwasser, read:

> "[First] National City Bank, January 31, 1972. Gerald Allicino has been in my employ (sic) since 1957 and is now earning a salary of $250 a week. Thank you. (signed) Seymour Rosenwasser" (451).[12]

Appellant then rested (470).

ARGUMENT

POINT I

Evidence of co-defendant Allicino's subsequent criminal act was properly admitted in evidence.

Appellant Rosenwasser claims that the District Court's admission of evidence regarding Allicino's March 28, 1972 illegal possession of hijacked liquor was error because it purportedly prejudiced the jury against him so as to deprive him of a fair trial. We submit that such a contention is baseless, especially in view of the underlying purpose of the offer of this proof and the manner in which the District Judge controlled its receipt and applicability.

"[Other] crimes evidence is admissible on the government's case in chief unless introduced solely to show the

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[12] Government Exhibit 22.

defendant's criminal character, provided that its probative worth outweighs its potential prejudice." *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975), *cert. denied*, — U.S. — (1976). See Fed. R. Evidence 404(b). Obviously, proof of Allicino's involvement in a subsequent hijacking was offered not to establish his "character" but to substantiate his participation in an identical crime. Such proof was relevant to show appellant's intent to enter into the conspiracy at issue, knowledge of the consequences of and awareness of his acts and the structure and development of the conspiracy. See *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975); *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975); *United States* v. *Catalano*, 491 F.2d 268 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). Moreover, Allicino's subsequent criminal act took place less than four weeks subsequent to the crime charged in the indictment. It can thus hardly be argued that the act was too far removed in time from the crime charged in the indictment to be relevant. *United States* v. *Super*, 492 F.2d 319 (2d Cir.), *cert. denied*, 419 U.S. 876 (1974).[13]

Appellant asserts that the facts adduced by the Government from its similar act proof against Allicino were in effect designed to and did bear on his substantive

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[13] Certainly *vis-a-vis* Allicino himself the trial Court properly exercised it discretion in admitting the similar act evidence. In view of the relatively weak case which the Government had against Allicino the evidence was clearly needed. Through the testimony of Agent Haridopolos the evidence of the criminal act was plain and because of the closeness in time and the similarity of the subsequent act to the crime charged, the evidence was probative of the issues for which it was admitted. See *United States* v. *Brettholz*, 485 F.2d 483, 487-488 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974).

guilt. In urging that the prejudicial effect of this evidence outweighed its probatve value appellant stresses that the evidence showed that on March 28, Allicino's van was followed to the same Pacific Street building where Rosenwasser rented space and that the stolen liquor was found on that occasion in a doorway just inside Rosenwasser's building. He reasons that these facts, although on their face solely applicable to Allicino, must have, of necessity, been utilized by the jury to convict appellant. To think otherwise, appellant asserts, would be "to engage in some bold fantasy." Appellant's brief at 18. We submit that upon analysis these naked assertions of prejudice are totally speculative and without merit.

To begin with, appellant fails to note that the jury was aware that Allicino's brother worked in the Pacific Street building and that the factory was directly across the street from where Allicir) himself had lived. In addition, the Court emphasized that the goods were found in a location *other than* where appellant leased space. In short, with the full factual presentation before it, the jury, rather than having linked the similar act testimony to Rosenwasser, more than likely utilized it exclusively against Allicino.

Moreover, Judge Platt painstakingly instructed the jury in the midst of Agent Haridopolos' direct examination as follows:

> "Ladies and gentlemen, you remember that after the opening statement I cautioned you that a portion of the Government's evidence would be only admissible against Mr. Allicino, and this apparently pertains to that portion of the evidence, and secondly, that it would only be introduced for the purpose of showing knowledge or intent in the commission of the crime charged in the indictment, and for that purpose only. I will

> give you four [sic] instructions on the law in this question in my charge. But bear in mind this does not go to prove the crime charged in the indictment. It only (sic), if you find the facts with respect to this portion of the case to be estabilshed, it only goes in on the question of knowledge and intent. It doesn't go in as proof to establish the crime charged in the indictment, in and of itself" (310).

In fact, at the very commencement of the trial after completion of the Government's opening statement, the Court had addressed the jury on the same issue:

> "Now ladies and gentlemen, with respect to that last bit of evidence, the Government said it was going to produce pertaining to the alleged possession, allegedly stolen liquor three weeks after the events described in this indictment, that is being offered on what we call proof of a similar act; or what the Government calls proof of a similar act and it's offered solely against the defendant Allicino. It is not being offered against the defendant Rosenwasser and if that evidence is produced it will only be received against defendant Allicino, and it will only be received for a limited purpose of showing knowledge with intent to commit the crime as to which I'll give you a further instruction at the conclusion of the case, but when and if that proof comes I'll give you preliminary instructions on the question;

and at the conclusion of the case I'll give you full instructions" (19-20).[14]

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[14] The court did in fact so charge the jury at the close of the trial. It charged as follows:

> Now, there was proof in this case which was admitted solely—I should say there was evidence in this case admitted solely against the defendant Allicino, namely the possession of recently stolen liquor, knowing the same to have been stolen sometime shortly after the events alleged in the indicment.
>
> Now, this special instruction, which I said I would give you on this point reads as follows:
>
> The fact that the defendant, Allicino, may have committed another offense at some time is not any evidence or proof whatever that, at a prior time, the accused committed the offense charged in the indictment, even though both defenses (sic) are of a like nature. Evidence as to an alleged earlier or later offense of a nature may not therefore be considered by the jury, in determining whether the accused did the act charged in the indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first finds that other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the act charged in the indictment, leaving aside only the question of whether he did it knowingly and willfully.
>
> If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused, Allicino, did the acts charged in the indictment, then the jury may consider evidence as to an alleged earlier or later offense of a like nature, in determining the state of mind, knowledge or intent with which the accused did the acts charged in the indictment. And where all the elements of an alleged earlier or later offense of a like nature are established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw the inference and find that in doing the act charged in the indictment, the accused, Allicino, acted willfully, knowingly, and with specific intent, and not because of mistake or accident or other innocent reason (618-620).

We submit that the principles set forth in *United States* v. *Payden*, Dkt. No. 76-1114, Slip Op. 4053 (2d Cir. June 8, 1976), govern here. In *Payden*, the salient issue before this Court was whether an unrelated charge contained in the indictment and stated solely against Payden's co-defendant Vernon created a misjoinder. In reaching its conclusion that joinder was proper, the Court reasoned that even if the unrelated charge had been severed, "evidence on which it was based was clearly admissible anyway against the co-defendant Vernon to show other similar acts by him". Id. at 4055. Here, the District Court merely followed the practice sanctioned in *Payden*. And, as there, "[t]he charge to the jurors properly cautioned them not to consider against [Rosenwasser] any evidence admitted solely against [Allicino]" Id. at 4066. The District Court complied in all respects with rule of *Payden* and, accordingly, we urge that, as in *Payden*, no reversible error was committed. See also *United States* v. *Gerry*, 515 F.2d 130, 140-141 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); Fed. R. Evidence 404(b).[15]

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[15] Rule 403 of the Federal Rules of Evidence permits a trial judge to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence". In the balancing of probative value against unfair prejudice required by Rule 403, Judge Platt had wide discretion and his ruling, in accordance with *United States* v. *Dobranski*, Dkt. Nos. 76-1108, 76-1254, Slip Op. 5091, 5096 (2d Cir. July 26, 1976) should not be disturbed unless his discretion was clearly abused.

We submit that the jury obviously adhered to Judge Platt's instructions. The best evidence of no prejudice and that the Court did not abuse its discretion is the fact the Rosenwasser was acquitted of the conspiracy charge. Had the jury failed to discriminate the application of the similar act evidence we believe the result would have been otherwise.

POINT II

Appellant was not deprived of his right to confrontation.[16]

Appellant argues that he was denied the right to confront witnesses who testified against him. He bases his claim on two assertions; first, that the trial Court improperly limited the scope of his cross-examination of Agent Redman; and second, that the Court precluded him from cross-examining Agent Haridopolos. We respectfully submit that both contentions are without merit. The Court correctly refused to allow any cross-examination testimony by Agent Redmond concerning a statement made to him by appellant simply because such evidence would have been pure hearsay. With respect to Agent Haridopolos, it is clear from the record that appellant's attorney *chose* not to question him and that he *was not* prohibited from doing so by the Court.

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Agent Redman's direct testimony concluded as follows:

> "[Assistant United States Attorney]: Now, in your capacity as case officer, Agent Redman, directing your attention to March 14, 1975, when you met with the defendant, Seymour Rosenwasser——
>
> A. Yes.
>
> Q. Was that meeting part of your official investigation?

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[16] This point responds to the arguments found in Points II and IV of Appellant's brief.

A. Yes.

Q. Would you tell the jury, please, where you met with him?

A. At the factory located at 2395 Pacific Street.

Q. Where is that?

A. In Brooklyn, New York.

Q. Did you have a conversation with him?

A. Yes.

[Assistant United States Attorney]: I have no further questions." (296-297).

When Rosenwasser's counsel attempted to introduce through Redman his client's exculpatory remarks, the Government's objection, registered on hearsay grounds, was sustained (299-302). At side-bar appellant argued that the failure of the Government to elicit the facts of the conversation might lead the jury to conclude that the substance of Redman's discussion with appellant reflected on appellant's guilt. The Court stated, however, that counsel was entitled to inquire as to what, if anything, Redman said to Rosenwasser:

"Mr. Wallach: I have to accept [sic] to it.

[Assistant United States Attorney]: My objection is based on hearsay.

Mr. Peluso: I thought the door was opened by that question.

Mr. Wallach: That is another point. He opened the door by the question.

The Court: I don't think so. Ask him what, if anything, he said to the defendant. The

sole purpose, as I understand, of that question, was to eliminate any question as to the whereabouts of the factory that you fellows raised during the course of your cross-examination of Fleischer, and to establish a location of Pacific Street as his current testimony showed.

Mr. Peluso: He went further and asked him, "Did you have a conversation?"

The Court: Yes.

[Assistant United States Attorney]: If it needs elaboration, your Honor, I would be happy to.

The Court: No. I won't let you put your defense——

[Assistant United States Attorney]: Any statment that would be elicited from Agent Redman as to any comment, statement made by Mr. Rosenwasser at that time, would come under the hearsay rule." (301-302, as amended by stipulation).

Obviously, Rosenwasser's exculpatory statements to Redman were not within the ambit of any exception to the hearsay rule. See Fed. R. Evidence 803. Indeed, Redman's testimony was clearly offered to illustrate the *fact* that a conversation took place and not its underlying substance. Unlike *United States* v. *Williams*, 478 F.2d 369 (4th Cir. 1973) and *Banning* v. *United States*, 130 F.2d 330 (6th Cir. 1942), relied upon by appellant to bolster his argument, the Government did not elicit from Redman part of a conversation favorable to the prosecution and omit damaging portions. Contrary to Rosenwasser's allegations, we do not here deal with the rule of "completeness" which would require an entire conversation to be placed before the jury so as to weigh its probative value in proper context.

Appellant stresses that "common knowledge regarding the right to remain silent may have influenced the jury's understanding of the matter" and also surmises that the jury was perhaps left with the impression that he had invoked his privilege against self-incrimination. Appellant's brief at 31. Surely appellant's argument as to what the jury may have speculated regarding this testimony is, in and of itself, rank speculation. To say the least, appellant's theory cuts at both edges. The jury knew that Rosenwasser spoke to the Government agent and consequently it could have easily inferred that the absence of the conversaton's content was tautamount to a conclusion by the Government that it was exculpatory. Indeed, why would the jury have assumed anything else? Contrary to his claims, appellant had neither the "right" nor the "duty" to explain this matter on cross-examination. See Appellant's brief at 32. If obligations there were, they in fact attached to the Government, whose responsibility it was to prevent hearsay evidence from flowing into the trial.

II

Similarly without merit is appellant's claim that the trial Court failed to allow him to properly question Agent Haridopolos. Upon completion of Haridopolos' direct testimony concerning Allicino's subsequent similar act, counsel for appellant Rosenwasser sought to cross-examine. The prosecutor objected, and the following side-bar discussion ensued:

> [Assistant United States Attorney]: I am objecting to any cross-examination by the defendant Rosenwasser and ask that the jury be instructed that none of this evidence comes in against him.
>
> Mr. Peluso: Well, Judge, pictures were admitted into evidence, and there is definitely a spillover as to my client.

I think I should at least be allowed to point out where the place is located. Also, we have had very ambiguous language that was brought out.

The Court: What is the church?

Mr. Peluso: That is part of the description of the area.

The Court: That's different.

Mr. Peluso: *In addition to that language being ambiguous as to the address at 2395 Pacific Street, now the impression can be—*

The Court: *No. It's not admitted against him.*

Mr. Peluso: I think I should make it clear to the jury.

The Court: *I have made it clear to the jury. You can call him as your own witness. You can instruct him to remain and put him on the witness stand, if you wish.*

Mr. Wallach: May we just have a moment, Judge.

The Court: Yes.

(Whereupon, an off-the-record conversation was held.)

The Court: I am assuming, [that the Government is] going to be resting momentarily .

[Assistant United States Attorney]: I will say this, your Honor, that the Government will take the position that if Mr. Peluso cross-examines this witness or, in fact, calls him as his own witness, the door will be opened wide for any inquiry that I might want to make, with respect to any knowledge he may have about anything that the defendant Rosenwasser—

Mr. Wallach: *I guess we will leave the door shut.*

The Court: *It's up to you.*

Mr. Peluso: Judge, am I going to be allowed to examine on those exhibits that were in evidence?

The Court: You will be allowed.

Mr. Peluso: Thank you. I will abide by your Honor's ruling, and I will not examine, subject to your Honor's rule.

(Whereupon, the following took place before the jury.)

Mr. Peluso: In view of your Honor's ruling, I have no further questions of this witness (319-321). (Emphasis supplied)

Clearly, appellant was given the opportunity to confront Agent Haridopolos. Counsel was told in no uncertain terms by Judge Platt that he could call Haridopolos as a defense witness. He chose not to do so, however, preferring instead for tactical reasons to "leave the door shut." Appellant can hardly contend that he was "prevented" from confronting a witness whom he decided not to question when the opportunity to do so was offered. The trial Court acted well within its discretion in controlling the scope of the cross-examination. See *Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

Moreover, appellant's reliance upon the reasoning contained in *Bruton* v. *United States*, 391 U.S. 123 (1968), and his urgings that such analysis applies here are entirely misplaced. *Bruton* held that the admission of a defendant's post-conspiracy confession implicating

a co-defendant constitutes reversible error if the confessing defendant does not take the stand. In ruling that such a procedure denies an accused his Sixth Amendment right of confrontation, the Court stated that a confession would be admissible against the non-confessing co-defendant in a jury trial where the confessing defendant testified and could be cross-examined. For *Bruton* to apply there must be a confession and it must clearly implicate a co-defendant. See *United States* v. *Gerry*, *supra*. Obviously, such was not the case here.

United States v. *Pollard*, 509 F.2d 601 (5th Cir.), *cert. denied*, 421 U.S. 1013 (1975), also cited by appellant, is in fact a case on point for the Government. In that case there was testimony by a witness that Pollard confessed to similar crimes. On appeal, a co-defendant claimed that he was denied his right to confrontation since he was unable to cross-examine Pollard as to these offenses. The *Pollard* Court observed that reliance on *Bruton* was improper:

> "The point is not well taken, since *Bruton* concerned the admission into evidence of the confession of one Evans implicating his co-defendant Bruton, denying to Bruton the right of confronting and cross-examining Evans. *Here, Pollard in no way implicated Herman in the California offenses and ample cautionary instructions by the trial judge protected Herman.* 509 F.2d at 604. (Emphasis supplied)

In the case at bar, Agent Haridopolos' testimony pertained only to Allicino, and as seen above, more than "ample" cautionary instructions were given by the trial Court concerning the similar act evidence.

POINT III

The First National City Bank letter was properly received in evidence for impeachment purposes.

Appellant asserts that the Government's use of the January 31, 1972 First National City Bank letter requires reversal because in essence it was extrinsic evidence used to prove a collateral matter. We submit that the record is clear that this exhibit was received in evidence solely for impeachment purposes.

In an effort to establish Rosenwasser's close personal relationship with Allicino, the Assistant U.S. Attorney inquired as to the length and time of Allicino's prior employment (432). Rosenwasser testified that Allicino was in his employe approximately twenty years prior (Id.). The prosecutor then asked Rosenwasser if Allicino had worked for him on other occasions, to which Rosenwasser ultimately emphatically interposed his denial (433). In an attempt to refresh appellant's recollection, the prosecutor asked him whether on January 31, 1972 he told someone that Allicino worked for him from 1957 to 1972 (440, 446). The First National City Bank letter was then shown to appellant and received in evidence (447-451). The Government requested the Court to instruct the jury that the underlying transaction was not to be considered as evidence against either party (470). In addition, the prosecutor represented to the Court that he would, if required, call the bank officer but that the matter was "collateral." Obviously the issue then in dispute was the *authenticity* of the document. The Government's statement that the matter was collateral pertained too that question and not, as appellant would have this Court believe, to whether Rosenwasser's credibility was "collateral."

Clearly, the letter was relevant to the credibility of Rosenwasser who was then on the witness stand testify-

ing to a false exculpatory statement. See *United States* v. *Maliah*, 503 F.2d 971, 981, (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). Moreover, the Court recognized the relevance of the letter stating: "It's collateral in the sense I will instruct the jury it has been introduced for impeachment purposes only, and this is not to be taken as evidence in chief, but that it is the purpose for which it was offered under credibility of the witness". (476).

In view of the above, we respectfully submit that the Government did nothing other than make permissible use of its right to cross-examine appellant and to impeach him with a prior inconsistent statement. See Fed. R. Evidence 613(b).

POINT IV

Appellant is precluded from attacking his sentence.

Appellant requests this Court to review the propriety of Judge Platt's sentence on the ground that the U.S. Department of Probation wrote a letter to appellant's wife claiming that he, appellant, received a substantially greater sentence than Allicino because Allicino had already served prison time for the March 28, 1972 liquor hijacking and because Rosenwasser was involved with Allicino in that hijacking but was never charged with any crime. In short, the letter apparently stated that appellant was now paying the penalty for an additional crime that he in fact committed but never paid for.

We submit that such letter, apart from not forming part of the record in this case, can in no way be construed so as to bind the District Court. Nowhere in the letter is there a statement that the Court acquiesced in the Probation Department's opinion. Indeed, the Court obviously felt it more appropriate not to express its views and consequently requested the Department to respond.

Moreover, and perhaps most significantly, *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975), expressly prevents a review by this Court of the District Court's sentence in this case.[17]

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
STANLEY A. TEITLER,
Assistant United States Attorneys,
Of Counsel.

September 8, 1976.

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[17] A copy of the Probation Department letter is set forth at page 201 of Appellant's appendix.

★ U. S. Government Printing Office 1976— 614—353—247

AFFIDAVIT OF MAILING

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of September 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

LaRossa, Shargel & Fischetti, Esqs.
522 Fifth Ave.
New York, N. Y. 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
14th day of September 19 76

Carolyn N. Johnson
CAROLYN N. JOHNSON
[illegible] State of New York
No. [illegible]
[illegible]
Term Expires March 30, 19[illegible]